

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

### **FACTUAL HISTORY**

On November 14, 2011 appellant, then a 43-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 10, 2011, while in the performance of duty, she sustained a compound fracture to her left leg and ankle when she fell down while walking down steps. She stopped work on November 10, 2011.

On November 16, 2011 appellant underwent closed reduction of the left pilon fracture with application of an external fixation device.

OWCP accepted her claim for open fracture of the left tibia and paid wage-loss compensation benefits. Appellant was placed on the periodic rolls effective December 26, 2011.

On July 7, 2012 appellant returned to part-time light-duty work for two hours per day. She received wage-loss compensation *via* direct deposit for the remaining six hours of the day.

By letter dated December 21, 2015, OWCP advised counsel that a third party may be liable for her work-related injury. It informed counsel that an EN1108 form (long form statement of recovery) must be filed, once appellant received a settlement, in order to calculate the refund owed to the United States.

In a June 29, 2016 e-mail, OWCP informed counsel that \$112,044.58 in wage-loss compensation and \$70,539.52 in medical benefits had been paid in connection with the claim, for a total of \$182,584.10 in payments issued to appellant as of that date.

By letter dated June 30, 2016, counsel advised the Department of Labor that appellant had received a third-party settlement as a result of the injury. He enclosed a completed EN1108 form dated June 30, 2016. The gross recovery was \$475,000.00. After deducting attorney fees (\$157,439.66), court costs (\$2,881.01), and an additional 20 percent (\$62,975.87), the remainder was \$251,903.46. The amount of benefits paid by the government \$182,584.10 and the government's allowable portion attorney fees \$60,517.85 were noted. The form indicated that a refund of \$122,066.25 was owed to the U.S. Department of Labor (DOL) ( $\$182,584.10 - \$60,517.85 = \$122,066.25$ ). It also noted that the credit against future benefits was \$69,319.36 ( $\$251,903.46 - \$182,584.10 = \$69,319.36$ ).

By letter dated July 14, 2016, OWCP informed counsel that the U.S. Government had a statutory right to a refund of compensation benefits in the amount of \$122,066.25. It further explained that, pursuant to section 8132 of FECA and 20 C.F.R. § 10.711, appellant would not receive a compensation payment until the undisputed surplus of \$69,319.36 had been exhausted.

On August 16, 2016 appellant, through counsel, submitted a check to OWCP in the amount of \$122,066.25. By letter dated August 23, 2016, OWCP confirmed the refund had been received.

In a separate August 23, 2016 letter to counsel, OWCP reiterated that there was still a surplus in appellant's case in the amount of \$69,319.36. It advised counsel that until the surplus had been exhausted that appellant was not entitled to any further wage-loss compensation or

medical benefits. OWCP indicated that it would resume compensation payments only after the amount of the surplus had been absorbed.

Nonetheless, appellant continued to receive compensation payment in the amount of \$1,791.00, representing appellant's wage-loss compensation for the period September 18 to October 15, 2016. She received another payment on November 12, 2016 in the amount of \$1,791.00, representing her wage-loss compensation for the period October 16 to November 12, 2016. A termination of compensation worksheet indicated that appellant had received an overpayment of \$3,582.00.

In a telephone call memorandum (Form CA-110) dated November 10, 2016, an OWCP claims examiner related that he spoke with appellant regarding the surplus in her case and the erroneous issuance of monthly checks to her by OWCP after the third-party settlement. Appellant reported that during a conference call with counsel, OWCP's claims examiner, and appellant, she was informed that she would be able to keep those checks. The claims examiner advised her that her case was on temporary closed status and that no benefits, including medical, would be paid until the surplus was exhausted.

Appellant telephoned OWCP again and OWCP reported in a Form CA-110 dated November 16, 2016 that they discussed several matters, including the status of her surplus and when her compensation payments would begin again. In a Form CA-110 dated November 21, 2016, an OWCP claims examiner reported that compensation would begin again on November 2, 2019.

On December 30, 2016 OWCP issued a preliminary finding of an overpayment of compensation in the amount of \$3,582.00 for the period September 18 to November 12, 2016 because she received wage-loss compensation during a period of a third-party surplus. It found that appellant was at fault in the creation of the overpayment because she knowingly accepted payments which she knew or reasonably should have known were incorrect. The preliminary decision provided an explanation of the calculation of the overpayment. OWCP requested that appellant respond and complete the attached overpayment action request and the overpayment recovery questionnaire form (OWCP Form 20) within 30 days. Appellant was informed of the required financial documentation and actions she could take.

In a January 18, 2017 letter, counsel clarified that he represented appellant in the underlying personal injury action and was not her attorney for purposes of any workers' compensation matter. He contended that it was unfair for OWCP to fault appellant for the overpayment. Counsel explained that his office remitted a check for the lien payment on August 9, 2016 in accordance with their agreement, but the check was not deposited until September 26 or 27, 2016. He related that he was advised that compensation payments would not stop until OWCP confirmed receipt of the lien payment and deposited the check. Counsel claimed that he was assured that future compensation payments would not add to the lien and would not be deducted from the surplus. He related that, when appellant received the October and November payments, he contacted OWCP and was advised that payments would continue until the district Office had processed the paperwork. Counsel alleged that appellant could not have known that these compensation payments were in error since she did everything to find out what to do upon their receipt and followed OWCP's directions on the matter. He further asserted

that appellant reached out to OWCP after receiving the October payment, but no one returned her call. Counsel contended that appellant performed her due diligence to reach out upon receipt of the funds to find out what she should do in order to correct the situation, but the district Office did not offer any guidance. He concluded that appellant could not be blamed for the overpayment.

By decision dated January 30, 2017, OWCP finalized the overpayment in the amount of \$3,582.00 and the finding that appellant was at fault in creating the overpayment. It requested that she forward payment for the full amount of \$3,582.00 within 30 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> Section 8132 of FECA outlines that where an injury or death for which compensation is payable is caused under circumstances creating a legal liability in a person other than the United States to pay damages and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or her in his or her behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payment to him or her for the same injury.<sup>3</sup> The applicable regulations reiterate that, after the refund owed to the United States is calculated, FECA beneficiary retains any surplus remaining and this amount is credited, dollar for dollar, against future compensation for the same injury.<sup>4</sup> OWCP will resume the payment of compensation only after the FECA beneficiary has been awarded compensation which exceeds the amount of the surplus.<sup>5</sup> Where a beneficiary who has received a third-party recovery has made the required refund, but subsequent events result in payment of compensation benefits, including medical benefits, this may result in an overpayment of compensation.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The record reflects that appellant received a third-party recovery of \$475,000.00. The June 30, 2016 EN1108 form provided the calculations of the amount that needed to be refunded directly to the United States, as well as any surplus funds that would offset future compensation benefits. After appropriate deductions for the costs of the third-party suit and attorney fees, a surplus was created against future compensation in the amount of \$69,319.36. As previously

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<sup>2</sup> *Id.* at § 8102.

<sup>3</sup> *Id.* at § 8132. *See also T.D.*, Docket No. 16-0565 (issued May 5, 2016).

<sup>4</sup> 20 C.F.R. § 10.712.

<sup>5</sup> *Id.*

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *FECA Third-Party Subrogation Guidelines*, Chapter 2.1100.10 (March 2006).

noted, future compensation payments are charged against the surplus until it has been exhausted.<sup>7</sup>

On October 15 OWCP erroneously continued compensation payments for the periods September 18 to October 15, 2016 (in the amount of \$1,791.00) and for the period October 16 to November 12, 2016 (in the amount of \$1,791.00), for a total compensation payment of \$3,582.00. This amount should have been credited against the remaining surplus rather than paid to appellant.<sup>8</sup> Therefore the Board finds that OWCP properly declared an overpayment of compensation in the amount of \$3,582.00.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.<sup>9</sup> No waiver of payment is possible if appellant is with fault in helping to create the overpayment.<sup>10</sup>

In determining whether an individual is with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

“An individual is with fault in the creation of an overpayment who:

Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

Failed to provide information which he or she knew or should have known to be material; or

Accepted a payment which he or she knew or should have known to be incorrect.”<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted payments she knew or should have known were incorrect. In an August 23, 2016 letter, OWCP informed appellant that she had a surplus in the amount of \$69,319.36 as a result of her third-party settlement. The amount of the surplus is undisputed. The letter also informed

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<sup>7</sup> *Supra* note 5.

<sup>8</sup> *See B.G.*, Docket No. 14-0850 (issued September 17, 2014).

<sup>9</sup> 5 U.S.C. § 8129(b).

<sup>10</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>11</sup> 20 C.F.R. § 10.433(a).

appellant that until the surplus had been exhausted, she was not entitled to any wage-loss compensation or medical benefits, but her compensation payments would resume after the amount of the surplus had been absorbed. Following receipt of the August 23, 2016 letter, appellant received two compensation checks, each in the amount of \$1,791.00, which represented wage-loss compensation benefits for the period September 18 to November 12, 2016. The issuance of the two checks resulted in an overpayment of \$3,582.00.

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper<sup>12</sup> and the recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.<sup>13</sup>

The Board finds that appellant was not at fault regarding the payments of wage-loss compensation benefits for the period September 18 to November 12, 2016. Although appellant was in receipt of the August 23, 2016 letter which informed her that she was not entitled to further benefit payments until the absorption of the surplus, there were subsequent communications between OWCP and counsel regarding the processing of the \$122,066.25 reimbursement check which evince an exercise of care and good faith in working with the district Office to ensure proper coordination of her reimbursement check and wage-loss compensation checks. After her inquiry, on November 10, 2016, appellant was informed by the claims examiner that she would be able to keep the two checks. In a November 21, 2016 correspondence appellant was notified by the claims examiner that her compensation would commence again on November 2, 2019.

In a January 18, 2017 letter, counsel responded on behalf of appellant, to OWCP's December 30, 2016 preliminary notice of overpayment letter. He asserted that it would be unfair for OWCP to fault appellant for the overpayment. Counsel explained that he sent the lien payment check on August 9, 2016 in accordance with the agreement, but that the check had not been deposited until September 26 or 27, 2016. He explained that he personally was in contact with the district Office and was assured that future compensation payments would not add to the lien and would not be deducted from the surplus. Following receipt of the two compensation checks counsel again contacted the district Office and was informed that the checks would be issued until all of the necessary paperwork had been processed. Appellant alleged that she also contacted the district Office, but she could not reach the claims examiner and no one returned her telephone call.

The Board finds that while appellant accepted two payments of wage-loss compensation benefits for the period September 18 to November 12, 2016, she was not at fault in the creation of the overpayment as she was not in a position to be aware that these two payments were incorrectly paid. Both appellant and her counsel have established their due diligence to determine whether the checks issued should properly have been cashed. Therefore OWCP has

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<sup>12</sup> Y.Z. Docket No. 15-1704 (issued February 4, 2016).

<sup>13</sup> *Id.*

presented insufficient evidence to establish that appellant accepted payments which she knew or should have known to be incorrect.<sup>14</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$3,582.00 for the period September 18 to November 12, 2016. The Board further finds that appellant was not at fault in creation of the overpayment. The case is, therefore, remanded to OWCP to determine whether waiver of the recovery of the overpayment is warranted.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 30, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.<sup>15</sup>

Issued: December 12, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> *J.S.*, Docket No. 17-1395 (issued October 27, 2017).

<sup>15</sup> Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.